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namely, that a *bona fide* defendant should be entitled on quasi-contractual principles to the cost of his labor, so long as it does not exceed the total increase in the value of the property.⁴ On the other hand, a defendant who has acted in bad faith is generally held answerable to a *bona fide* plaintiff to the extent of the value of the property in its improved state.⁵ His bad faith of course prevents his receiving any quasi-contractual relief. The enhanced value of the property should be made the measure of damages, not for the purpose of punishing the defendant, but because that is the value to which the plaintiff is justly entitled, since the defendant, knowing the facts, must be taken to have made the improvements for the owner's benefit.

The exceptional situation of a *mala fide* plaintiff and a *bona fide* defendant arose in a recent Michigan case. *Gustin v. Embury Clark Lumber Co.*, 108 N. W. Rep. 650. The court allowed to be deducted from the enhanced value of the property the increase in value brought about by the defendant. The *mala fides* of the plaintiff was evidently considered, but on grounds of fairness it might well be urged that as the plaintiff consciously delayed suit he should recover only the value of the property before severance,⁶ thus losing any possible increase in value due to a rise in the market. The remaining combination of a *mala fide* plaintiff and a *mala fide* defendant was presented in a single case,⁷ in which damages were limited to the value of the standing timber. The case seems unsupportable, for neither on quasi-contractual principles nor on grounds of general fairness did the defendant deserve anything of the court. The plaintiff's like bad faith could not here affect his legal right, and the rule in the ordinary case of a *mala fide* defendant should apply.

If the doctrine of *Wetherbee v. Green*⁸ is ever extended to include the case of a *mala fide* converter, a new problem as to damages will arise. Since the defendant by sufficiently increasing the value of the property will have acquired title to it, to allow the former owner to recover from the new owner any value added to the property after title passed would be manifestly illogical. But neither should the defendant escape by paying only the value of the property at the time of the conversion, for, had he been sued immediately before title passed, he would have been compelled to pay the value at that time. It would therefore seem proper to compel him to pay the value of the property when he acquired title.

RES IPSA LOQUITUR BETWEEN MASTER AND SERVANT. — The doctrine of *res ipsa loquitur* has been most frequently applied in cases of injuries to passengers of common carriers and to persons on the highway who have been struck by some substance falling from an adjoining building. In the case of a servant injured in the course of his service there is much dispute as to whether the doctrine should be applied.¹ A recent case, where a servant was injured by the fall of an elevator, holds its application proper. *Fohn*

⁴ See *Trustees v. International Paper Co.*, 132 Fed. Rep. 92; 18 HARV. L. REV. 305.

⁵ *Cheaney v. Stone Co.*, 41 Fed. Rep. 740. See *Woodenware Co. v. United States*, 106 U. S. 432.

⁶ Cf. *Single v. Schneider*, 24 Wis. 299.

⁷ *Single v. Schneider*, 30 Wis. 570.

⁸ 22 Mich. 311.

¹ See *Highland Boy Mining Co. v. Pouch*, 124 Fed. Rep. 148.

Samuels, Adm'r v. John McKesson, Jr., 113 N. Y. App. Div. 497. Some of the carrier cases may be explained on the ground that the carrier is regarded as a quasi-insurer of its passengers' safety, and not upon the view that the accident itself makes a *prima facie* case.² And doubtless in the cases of pedestrians hit by a falling substance, there is an underlying principle that sound juridical policy requires a man so to use his property adjacent to the highway as not to endanger passers-by; so that in these cases negligence will be presumed until he who has all the evidence that would reveal whether the harm was culpable or innocent shall speak and explain it.³ But the essence of the doctrine itself is the effect to be given to a rather meager amount of circumstantial evidence, — whether the circumstances of a particular case are sufficient to raise a rebuttable presumption of negligence.

No sound reason can be urged why the doctrine should not extend to cases of master and servant. The maxim originated from the nature of the occurrence, and not at all from the relation of the parties.⁴ Many of the numerous decisions generally cited as *contra* to the above case show, when analyzed, not so much that the court was unwilling to apply the doctrine to master and servant, as that the special facts involved were not such as to present a proper situation for its application. Others show that the true ground of the decision was that the servant impliedly assumed the risk, and not that the maxim was inapplicable.

That this is a doctrine only of the quantity of circumstantial evidence required, is proved by the fact that there is no case where liability is predicated on the happening of the accident alone.⁵ The fact that the deceased was killed beside a building by a brick does not make a *prima facie* case. But if the proof of circumstances goes enough further to show that he was a pedestrian on the street, that the brick fell from a neighboring building, and that the defendant was the owner of the building, the onus then devolves upon the defendant to go forward with evidence to disprove negligence.⁶ And so it would be a complete perversion of the doctrine to hold a railway company liable when the proof shows only that a man who was not a passenger was found dead in the morning, killed by a passing train; because there the circumstances go no further than to show a presumption at least equally as strong that he was negligent in not avoiding the train as that the engineer was negligent in not avoiding him.⁷ The doctrine, therefore, should be applied only where the conditions are such that a fair-minded man would say that if the instrument of the injury were properly examined and operated, the accident in all probability would not have happened; where the instrument is within the defendant's control, and he has both user and inspection; and where the injury occurs irrespective of any contributory act of the plaintiff or of a third person.⁸ Of course, the relation of the parties to each other may be in itself a very important circumstance in determining whether the facts of a particular case call for the application of the doctrine. But it seems right, in the absence of public policy, to hold that the relation of master and servant, or any other relation, does not prevent as a matter of law the application of the maxim.

² *Osgood v. Los Angeles Traction Co.*, 137 Cal. 280. Cf. 16 HARV. L. REV. 227.

³ See *Hawser v. Cumberland & P. Rd. Co.*, 80 Md. 146.

⁴ *Guldseth v. Carlin*, 46 N. Y. Supp. 357. Cf. 18 HARV. L. REV. 391.

⁵ See *Murphy v. Great Northern Ry. Co.*, 68 Minn. 526.

⁶ *Byrne v. Boadle*, 2 H. & C. 722.

⁷ *Church, Adm'r v. Northern Pac. Rd. Co.*, 31 Fed. Rep. 529.

⁸ See 4 Wig., Ev., § 2509.